Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

UNITED STATES FIRE INSURANCE COMPANY and INTERNATIONAL INSURANCE COMPANY,

Petitioners,

v.

NATIONAL GYPSUM COMPANY, n/k/a Asbestos Claims Management Corporation, NGC SETTLEMENT TRUST, and CENTER FOR CLAIMS RESOLUTION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. When a party asserts collateral estoppel as a defense against a contract claim brought in arbitration pursuant to a broad arbitration clause, and when resolution of the defense requires interpretation of the contract containing the broad arbitration clause, does the Federal Arbitration Act require that the defense be resolved in the arbitration?

2. Does prior litigation regarding the meaning of an insurance policy as applied to one coverage claim collaterally estop a subsequent arbitration regarding the effect of a separate agreement between the parties on that meaning as applied to a different coverage claim, when the scope of that separate agreement admittedly does not encompass the coverage claim decided in the prior litigation?

RULE 29.6 STATEMENT

The parent company of Respondent National Gypsum Company (n/k/a Asbestos Claims Management Corporation) is Respondent NGC Settlement Trust. National Gypsum Company has no nonwholly owned subsidiaries.

Respondent NGC Settlement Trust has neither a parent company nor any nonwholly owned subsidiaries.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondents National Gypsum Company and NGC Settlement Trust (collectively, "Respondents"[1]) respectfully request that this Court deny the petition for writ of certiorari that seeks review of the Second Circuit's opinion in this case.

STATUTORY PROVISION INVOLVED

Section 2 of the Federal Arbitration Act provides that written arbitration provisions in any contract involving interstate or international commerce "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (1994).

STATEMENT OF THE CASE

This case arises from an insurance coverage dispute involving an agreement's effect on certain provisions in three excess liability insurance policies issued by Petitioners to National Gypsum Co. ("National Gypsum"). National Gypsum was a leading manufacturer of gypsum wallboard and other building materials that contained asbestos, and has since been sued both by claimants seeking damages for asbestos-related bodily injury and

[1] Note that, as here defined, "Respondents" does not include the Center for Claims Resolution. This Brief in Opposition is filed on behalf of only National Gypsum Company and the NGC Settlement Trust.

also by building owners seeking damages for asbestos-related property damage.

On June 19, 1985, producers of products containing asbestos (including National Gypsum) and certain of their insurers (including Petitioners) executed the Agreement Concerning Asbestos-Related Claims ("Wellington Agreement"). The Wellington Agreement resolved most insurance coverage disputes between Respondents and Petitioners with respect to third-party claims against National Gypsum for asbestos-related *bodily injuries* ("Wellington Claims"); the Wellington Agreement did *not* resolve (or even address) insurance coverage disputes over third-party claims for asbestos-related *property damage* ("Non-Wellington Claims").

By signing the Wellington Agreement, Petitioners surrendered any opportunity to associate in the defense of Wellington claims. Specifically, pursuant to section IV paragraph 1, all the signatories designated an Asbestos Claims Facility ("ACF") as their "sole agent" for the defense of Wellington Claims. (Pet. Writ Cert. App. at 56a [hereinafter Cert. App.].)[2] Although the parties dispute this point, Respondents contend that Petitioners' execution of the Wellington Agreement constitutes either consent to, or a waiver of their right to require consent to, the incurring of defense costs in Wellington Claims.

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[2] Subsequently, the ACF was dissolved; and many signatories (including National Gypsum Company and Petitioners) formed the Center for Claims Resolution to perform similar functions as the ACF.

Section VIII paragraph 6 of the Wellington Agreement contains a broad arbitration clause by which Petitioners and Respondents may resolve this present contention about the effect of the Wellington Agreement on the consent provisions contained in Petitioners' policies as applied to Wellington Claims: "Subscribing Producers and Subscribing Insurers shall resolve through alternative dispute resolution . . . any disputed issues within the scope of the [Wellington] Agreement." (*Id.* at 61a.) No defenses (including collateral estoppel) were excepted from this agreement to arbitrate. On November 2, 1993, National Gypsum initiated the alternative dispute resolution ("ADR") proceedings pursuant to this arbitration clause in order to resolve its right to defense costs in the Wellington Claims.[3]

Specifically, Respondents wish to pursue in ADR their position that Petitioners owe defense costs incurred on Wellington Claims notwithstanding the absence of some formal written "consent" by Petitioners, for the reasons set forth above. These Wellington-based arguments have never been raised before any court considering this dispute between these parties. On December 23,

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[3] Incidentally, coverage for Wellington Claims is accessed under the Wellington Agreement on a policy-by-policy basis; the timing of that access is determined by a specific allocation formula contained in the Wellington Agreement. Although the parties dispute the timeliness of Respondents' claim for Wellington-Claims defense costs, Respondents contend that they initiated the ADR as soon as appropriate under that formula (i.e., as soon as it became apparent that the Petitioners' policies would be accessed and that Petitioners did not intend to reimburse defense costs in a timely fashion). (*See* Cert. App. at 10a (noting parties' dispute on this point).)

1994, after the mediation phase of the Wellington ADR had failed, Respondents sought to initiate the next phase of Wellington ADR – arbitration. As a defense to the arbitration, Petitioners contend that Respondents are collaterally estopped from asserting their argument for defense costs incurred on Wellington Claims.

The prior judgment on which Petitioners base their collateral estoppel argument is *Stonewall Insurance Co. v. National Gypsum Co.*, No. 86 Civ. 9671 (S.D.N.Y. Mar. 22, 1993), *aff'd in relevant part*, 73 F.3d 1178 (2d Cir. 1995). That case involved National Gypsum's right to coverage for defense costs incurred on *Non*-Wellington Claims. In that case, the district court (Judge Martin) held that consent provisions in Petitioners' policies entitled Petitioners to withhold their consent to (and therefore not reimburse National Gypsum for) defense costs incurred in *Non*-Wellington Claims. In the *Stonewall* litigation (and subsequent appeal), Respondents were not free to argue the effect of the Wellington Agreement on the policies' consent provisions because the Non-Wellington Claims at issue in *Stonewall* were not within the scope of the Wellington Agreement. Even so, Petitioners contend that Respondents are now collaterally estopped from seeking Wellington-Claims defense costs in a Wellington ADR.

Rather than make that contention in the Wellington ADR, however, Petitioners filed an action in the United States District Court for the District of New Jersey seeking an injunction against the Wellington ADR based on their collateral-estoppel argument, and Respondents cross-moved for an order compelling arbitration under the Federal Arbitration Act. The case was transferred to Judge Martin in the Southern District of New York, the

same judge that issued the *Stonewall* opinion [illegible] Wellington-Claims defense costs that the Petitioners claim is issue-preclusive.

Judge Martin held that collateral estoppel is not arbitrable, (*see* Cert. App. at 15a-16a), and then agreed with Petitioners that his own prior *Stonewall* ruling collaterally estopped Respondents from seeking Wellington-Claims defense costs in a Wellington ADR, (*see id.* at 20a). On this second point, Judge Martin interpreted the Wellington Agreement as adopting the common-law rule of *contra proferentum*. (*See id.* at 18a.) Judge Martin reasoned that because the Wellington Agreement essentially restates the same rule of *contra proferentum* that he applied in his *Stonewall* decision, the issue of defense-costs coverage for Wellington claims was identical to the issue of defense-costs coverage for Non-Wellington Claims. (*See id.* at 20a.) Because the parties had already litigated the issue of defense-costs coverage for *Non*-Wellington Claims in the *Stonewall* litigation, Judge Martin concluded that Respondents were collaterally estopped from arbitrating the issue of defense-costs coverage for Wellington Claims in a Wellington ADR. Finally, as relief, Judge Martin invoked his power under the All Writs Act to enjoin the Wellington ADR. (*See id.* at 21a.)

On appeal, Petitioners and Respondents filed briefs addressing Judge Martin's holdings on both the arbitrability and merits of collateral estoppel. In a unanimous decision, the Second Circuit reversed Judge Martin's arbitrability holding. After noting the strong federal presumption of arbitrability, the court held that Judge Martin had based his collateral-estoppel holding on his own interpretation of the Wellington Agreement. (*See id.* at

7a-8a.) Because "[a]t least one facet of the [collateral estoppel] dispute thus requires interpretation of Wellington," the Second Circuit held that the dispute should have been decided by an arbitrator. (*Id.* at 8a.)

As additional support for its reversal, the Second Circuit held that collateral estoppel was not "so obscure a question" as to "cast doubt upon whether the parties intended that it be subject to arbitration." (*Id.*) In this regard, the court also reasoned that, because parties may agree to waive the collateral-estoppel defense in an arbitration, they may likewise agree to arbitrate the defense. (*See id.* at 9a.) Finally, the court noted prior Second Circuit case law holding that collateral estoppel is itself "part of the dispute on the merits," so that a broad agreement to arbitrate a particular dispute encompasses standard defenses to that dispute like collateral estoppel. (*Id.* at 9a-10a.) In light of its disposition of the arbitrability question, the Second Circuit did not reach Judge Martin's holding on the merits of collateral estoppel. Instead, it compelled arbitration of the dispute that Respondents have desired to arbitrate since December 1994: the effect of the Wellington Agreement on the consent provisions in Petitioners' policies. The court noted that Petitioners were free to assert the defense of collateral estoppel in the arbitration. (*See id.* at 10a.)

On January 30, 1997 the Second Circuit panel that heard this case denied Petitioners' motion for rehearing, and advised the parties that no Second Circuit judge in regular active service had requested that a vote be taken on Petitioners' suggestion for a rehearing en banc. On February 25, 1997, the Second Circuit denied Petitioners'

motion for a stay of arbitration pending disposition by this Court of their Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I. THE PETITIONERS' FIRST AND THIRD QUESTIONS PRESENTED WOULD REQUIRE THIS COURT TO FIRST RESOLVE THE MERITS OF A COLLATERAL ESTOPPEL DISPUTE THAT NEITHER WAS DECIDED BY THE SECOND CIRCUIT NOR IS WORTHY OF THIS COURT'S REVIEW.

Petitioners' first Question Presented asks whether the All Writs Act permits a federal district court to "protect" its prior judgment by enjoining an arbitration of issues "previously adjudicated between the same parties by that court." This question improperly assumes that Judge Martin "previously adjudicated" Respondents' right to Wellington-Claims defense costs, the crux of the very dispute that the Second Circuit has ordered the parties to arbitrate – collateral estoppel. Similarly, the third Question Presented assumes that Judge Martin's *Stonewall* decision has a "preclusive effect" to be enforced in this proceeding. Again, it assumes a particular resolution of the entire dispute underlying this case – collateral estoppel.

In this proceeding, the Second Circuit did not decide what Petitioners would ask this Court to assume. Specifically, the Second Circuit did not decide that the parties have previously litigated the issue underlying Respondents' coverage claim in this case; this question was explicitly left to the arbitrator. (*See* Pet. App. at 10a.)

Thus, the Second Circuit had no reason to decide (and did not decide) the "Questions Presented" that Petitioners derive from that assumption – i.e., whether the All Writs Act permits a judge to enjoin an arbitration of an issue "previously adjudicated," or whether the All Writs Act confers enforceable rights on private litigants.

Indeed, the Second Circuit did not even mention the All Writs Act in its opinion, and properly so. Before a court may evaluate the particular remedies permitted by the All Writs Act, there must first be a determination that there is occasion for a remedy. In this case, that occasion could be threatened relitigation of an identical issue; but there is no final determination that Respondents' desired arbitration threatens relitigation of an issue already decided elsewhere. Until such time, there is no need to opine what remedy would be appropriate (under the All Writs Act or any other act) in such circumstances.

Furthermore, the merits of collateral estoppel (the prior resolution of which is a necessary assumption underlying the first and third Questions Presented) is not sufficiently important to warrant this Court's review.[4] In short, Respondents seek to arbitrate their right to defense costs for Wellington Claims. Although *Stonewall* held, in regard to *Non*-Wellington Claims, that the consent provisions in Petitioners' policies precluded Respondents' recovery of *Non*-Wellington-Claim defense costs, Respondents seek to argue in arbitration that the Wellington

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[4] The second Question Presented in this Brief in Opposition poses the collateral-estoppel issue in this case. Until this issue is resolved, Petitioners' first and third Questions Presented are purely hypothetical.

Agreement impacted the meaning of the consent provisions at issue in *Stonewall*. Specifically, Respondents contend that by signing the Wellington Agreement, Petitioners either consented to, or waived any right to require consent to, Respondents' payment of defense costs in the Wellington Claims. This argument was unavailable to Respondents in *Stonewall* because the scope of the Wellington Agreement does not extend to Non-Wellington Claims.

Although Respondents are eager to make their arguments on the merits of the collateral estoppel issue, Respondents respectfully suggest that the issue is not worthy of certiorari. *See Rice v. Sioux City Mem'l Park Cemetery, Inc.*, 349 U.S. 70, 79 (1955) (" '[I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties. . . . ' ") (quoting *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923)).

II. THE PETITIONERS' THIRD QUESTION PRESENTED WAS NEITHER RAISED BEFORE NOR DECIDED BY THE SECOND CIRCUIT.

The Second Circuit did not decide whether the All Writs Act confers any enforceable "right" on private litigants, the inquiry underlying Petitioners' third Question Presented. Moreover, the Petitioners never raised this issue in any court below. This particular Question Presented is an entirely new formulation of Petitioners' contentions that is found nowhere else in the record of this

case. In short, it simply cannot be extracted from either the opinion below or the Petitioners' prior arguments. *See, e.g., Sisson v. Ruby,* 497 U.S. 358, 359 n.1 (1990) (declining to consider argument not raised below); *Delta Air Lines, Inc. v. August,* 450 U.S. 346, 362 (1981) (holding that question "not raised in the Court of Appeals" was "not properly before" Court); *United States v. Mendenhall,* 446 U.S. 544, 552 n.5 (1980) ("[T]he Court ordinarily does not consider matters neither raised before nor decided by the courts below. . . . "). Respondents located *no* argument in *any* source that the All Writs Act confers rights on private litigants, much less an argument in this case's record.

III. THE ALLEGEDLY CONFLICTING DECISIONS ARE DISTINGUISHABLE ON THEIR FACTS, THEIR LAW, OR BOTH.

Even assuming that a conflict among the circuits, without more, is enough to warrant certiorari, Petitioners have demonstrated no "real and embarrassing" conflict. *Rice v. Sioux City Mem'l Park Cemetery, Inc.,* 349 U.S. 70, 79 (1955). As stated by a leading treatise, a certiorari-worthy conflict cannot be "merely an inconsistency in dicta or in the general principles utilized." Robert L. Stern et al., *Supreme Court Practice* § 4.3, at 167 (7th ed. 1993). Petitioners cite four other circuit court opinions, none of which demonstrate a direct conflict. (*See* Pet. Writ Cert. at 6.)

The supposedly conflicting holding from the Third Circuit is mere dicta. *See Telephone Workers Union v. New*

Jersey Bell Telephone Co., 584 F.2d 31 (3d Cir. 1978). Moreover, that case did not involve an agreement to arbitrate, but rather a final award in a labor arbitration that was contrary to a prior judicial consent decree. *See id.* at 32. Also, the court's dictum suggesting that the result would have been the same in an action to compel arbitration is inconsistent with more recent Third Circuit authority holding that collateral estoppel *is* an issue for arbitrators. *See Local 863 Int'l Bhd. of Teamsters v. Jersey Coast Egg Producers, Inc.*, 773 F.2d 530, 534 (3d Cir. 1985) ("Assuming, *arguendo*, that this doctrine of collateral estoppel precludes relitigation . . . it remains within the arbitrator's purview to interpret the impact of such a finding. . . . "); *Butler Armco Indep. Union v. Armco Inc.*, 701 F.2d 253, 256 (3d Cir. 1983) (" '[W]e conclude that it is for the arbitrator to evaluate . . . whether [the prior arbitration award] qualifies . . . as the same "question or issue" presented by the immediate grievance. . . . ' ") (quoting *Local 103 of the Int'l Union of Elec., Radio & Mach. Workers v. RCA Corp.*, 516 F.2d 1336, 1340-41 (3d Cir. 1975)).

Finally, *Telephone Workers* has been cited as an example of applying the "public policy" exception to arbitrability. *See Perma-Line Corp. of Am v. Sign Pictorial & Display Union, Local 230*, 639 F.2d 890, 895 (2d Cir. 1981). But the "public policy" exception, and therefore *Telephone Workers*, has since eroded as courts have become more trusting in the arbitration process. Thus, the Second Circuit's opinion in this case does not conflict with *Telephone Workers* because *Telephone Workers* (1) involved substantially different facts, (2) presents, at most, an inconsistency in dicta, and (3) has lost all weight as authority by

reason of *Jersey Coast* and *Butler Armco*, and of the demise of the "public policy" exception to arbitrability.

Nor is there any conflict between the Second Circuit's opinion in this case and *Ewart v. Y&A Group, Inc. (In re Y&A Group Securities Litigation)*, 38 F.3d 380 (8th Cir. 1994). *Y&A Group* demonstrates only that a court may block arbitration in narrow circumstances not present here. In *Y&A Group*, a class action, the district court had entered an express injunction barring relitigation based on a settlement in which the plaintiffs released all claims against all potential defendants. The district court later issued a preliminary injunction staying an arbitration that a plaintiff pursued in violation of the earlier injunction. *See* 38 F.3d at 384-85.

Y&A Group did *not* hold that a party may ignore an agreement to arbitrate simply because it intends to assert collateral estoppel arising from a prior judgment. Instead, it held that because "the court which issues an injunction is the only one with authority to enforce it," *id.* at 383, a court may issue an injunction to restrain a violation of its own earlier injunction. *See also id.* at 384-85 (Arnold, C.J., concurring) ("I do not read this Court's opinion today to hold generally that courts may, by injunction, control the decision of arbitrators on questions of issue or claim preclusion. In the present case, though, the judgment in question also included an express injunction barring relitigation, and I would be most reluctant to say that a court cannot enforce its own pre-existing injunctive order.").

Thus, *Y&A Group* does not present a real conflict on the same matter of law or fact. In this dispute (as in

virtually all cases in which a party asserts preclusion), the Petitioners rely only on a judgment, not an injunction against arbitration; there is no claim that Respondents are in contempt of court for violating any injunction against arbitration. In fact, absent an injunction as in *Y&A Group*, the Eighth Circuit is in full accord with the Second Circuit's opinion in this case. *See Trailways Lines, Inc. v. Trailways, Inc. Joint Council*, 807 F.2d 1416, 1425 (8th Cir. 1986) ("[A]n arbitrator generally has the power to determine whether a prior award is to be given preclusive effect.").

Nor is a direct conflict created by *Miller Brewing Co. v. Ft. Worth Distilling Co.*, 781 F.2d 494 (5th Cir. 1986). In that case, the court did not reach the arbitrability issue until after its holding in the case: that the party seeking to arbitrate had waived its right to do so. *See id.* at 497. Only after reaching that holding did the court comment on arbitrability. As dicta, those comments do not create a direct conflict with the Second Circuit's opinion in this case.

Finally, in *Kelly v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 985 F.2d 1067 (11th Cir. 1993) (per curiam), the court held that res judicata is not arbitrable. Thus, because the Second Circuit's opinion involved collateral estoppel, the Eleventh Circuit's decision is not a real conflict on the same matter of law. Moreover, to reach its holding, the court simply noted the virtues of res judicata. In this case, the Second Circuit reached its holding by concluding that addressing the merits of collateral estoppel required interpretation of a document (the Wellington Agreement) that only an arbitrator could interpret. Never mind that these two cases did not consider the

same matter of law. They do not even demonstrate an inconsistency in general principles utilized; indeed, each utilized completely different principles.

In sum, Petitioners have demonstrated no "real and embarrassing" conflict among the courts of appeals. To the contrary, the courts of appeals are trending toward agreement on the arbitrability of preclusion doctrines. *See Aircraft Braking Sys. Corp. v. Local 856, United Auto., Aerospace & Agric. Implement Workers*, 97 F.3d 155, 159 (6th Cir. 1996) (holding that arbitrators "generally are entitled to determine in the first instance whether to give the prior judicial determination preclusive effect"), *cert. denied*, 117 S. Ct. 1311 (1997); *Trailways Lines, Inc. v. Trailways, Inc. Joint Council*, 807 F.2d 1416, 1425 (8th Cir. 1986) ("[A]n arbitrator generally has the power to determine whether a prior award is to be given preclusive effect."); *Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc.*, 860 F.2d 1420, 1424 (7th Cir. 1988) ("Procedural issues, including . . . the res judicata effect of a prior arbitration award . . . are for the arbitrator. . . . "); *Local Union No. 370 of the Int'l Union of Operating Eng'rs v. Morrison-Knudsen Co.*, 786 F.2d 1356, 1358 (9th Cir. 1986) ("[D]efenses of collateral estoppel and equitable estoppel[ ] are subject to arbitration."); *Little Six Corp. v. United Mine Workers, Local Union No. 8332*, 701 F.3d 1356, 1358 (4th Cir. 1986) ("[T]here is solid, well-reasoned case law holding that the preclusive effect of a prior arbitral award is itself a question for arbitration."); *Local 863 Int'l Bhd. of Teamsters v. Jersey Coast Egg Producers, Inc.*, 773 F.2d 530, 534 (3d Cir. 1985) ("Assuming, *arguendo*, that this doctrine of collateral estoppel precludes relitigation . . . it remains within the arbitrator's purview to interpret the impact of such a

finding. . . . "); Michael A. Knoerzer, *Collateral Estoppel and Arbitration*, Mealey's Litig. Rep.: Reins., Mar. 12, 1997, at 23, 24 ("While the Second Circuit appears to be at the vanguard on this issue, *most other courts agree* that the collateral estoppel issue is ordinarily to be decided by the arbitrators.") (emphasis added).

Even assuming some conflict in dicta or principles utilized by the circuits, such conflict would be far from mature. *See Miller v. Runyon*, 77 F.3d 189, 194 (7th Cir.) ("When . . . a party is seeking . . . to constrain the arbitrator, he *may not (or may – we cannot find a case)* be able to obtain injunctive or other judicial relief in advance of the arbitration . . . and so may have to take his chances on persuading the arbitrator to apply collateral estoppel.") (emphasis added), *cert. denied*, 117 S. Ct. 316 (1996). Respondents located no circuit court decision that has explicitly acknowledged that its holding on the arbitrability of collateral estoppel is in conflict with that of another circuit, and at least one commentator has discussed the arbitrability of collateral estoppel as an issue that has only emerged in "[r]ecent decisions by the Federal Courts of Appeal." Knoerzer, *supra*, at 23.

IV. THE SECOND CIRCUIT FULLY CONSIDERED AND CORRECTLY DECIDED THE ISSUES.

The Petitioners' petition is largely a rehash of arguments that failed to sway the Second Circuit. That court correctly ignored Petitioners' persistent rally around the residual and off-point authority of the All Writs Act. The arbitrability of collateral estoppel is governed by the Federal Arbitration Act, not the All Writs Act. *See Carlisle*

v. United States, 116 S. Ct. 1460, 1467 (1996) (" 'Where a statute specifically addresses the issue at hand, it is that authority, and not the All Writs Act, that is controlling.' ") (quoting *Pennsylvania Bureau of Correction v. United States Marshals Serv.*, 474 U.S. 34, 43 (1985)). The All Writs Act did not change the black letter law on arbitrability. The Federal Arbitration Act contains no exception for a judge's ad hoc feeling about what is "appropriate" and "necessary" under the All Writs Act.

The Second Circuit's holding relied largely on the fact that Judge Martin's resolution of the parties' collateral estoppel dispute hinged on Judge Martin's interpretation of a contract subject to a broad arbitration clause: "[T]he district court had to interpret Wellington in order to rule on the question of issue preclusion. At least one facet of the dispute thus requires interpretation of Wellington, plainly a question for the arbitrator rather than for the district court to decide." (Pet. App. at 8a.) This fact – resolution of the merits of collateral estoppel requires the interpretation of an agreement subject to a broad arbitration clause – is dispositive of collateral estoppel's arbitrability in this case, and no contrary arguments in Petitioners' certiorari petition are persuasive.

A dispute is arbitrable if, with all doubts resolved in favor of arbitration: (1) the parties agreed to arbitrate and (2) the scope of that agreement encompasses the present dispute. The Petitioners graft their own preliminary step on to this Court's two-step arbitrability rule by arguing that a prior "final adjudication of a dispute" "extinguishes any justiciable controversy" that could have been

arbitrated. (Pet. Writ Cert. at 15.) But Petitioners' proposed new step renders collateral estoppel's *merits* dispositive of collateral estoppel's *arbitrability*. The merits of a dispute have no bearing on the arbitrability of a dispute. *See, e.g., United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 568 (1960) ("The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious.").

Petitioners repeatedly insist that prior federal judgments must be "protected." (*See, e.g.*, Pet. Writ Cert. at 19 ("The gravamen of the issues presented in this case is not merely one of enforcing an arbitration agreement . . . but [one] of protecting a valid federal judgment.").) This repeated plea for "protection" of a prior judgment betrays a rather outdated and unfounded distrust of the competence of arbitrators to apply the doctrine of collateral estoppel. Collateral estoppel itself "protects" prior judgments. Thus, the question presented by this case is not *whether* prior judgments will be "protected," but rather *who* will "protect" such prior judgments. The Petitioners have advanced no reason or authority why arbitrators cannot be trusted to competently apply preclusion doctrines.

The Petitioners' implicit argument that a Wellington arbitrator might not correctly determine the applicability of the principle of collateral estoppel is inconsistent with the holding of this Court in *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 115 S. Ct. 2322 (1995). In that case, the petitioners contended that foreign arbitrators would not properly apply choice-of-law principles. This Court rejected the petitioners' "skepticism over the ability of foreign arbitrators to apply [the applicable law]," *see id.* at

2328, and instead held that the circuit court "was correct to reserve judgment on the choice-of-law question, as it must be decided in the first instance by the arbitrator," *see id.* at 2330.

Respondents here seek only to enforce a broad arbitration agreement that makes no exception for collateral estoppel or any other defense. *See Quackenbush v. Allstate Ins. Co.*, 116 S. Ct. 1712, 1727 (1996) (describing the "enforcement of arbitration agreements" as "a substantial federal concern"). Petitioners' fear that such arbitration will open Judge Martin's *Stonewall* ruling to "collateral attack" is unfounded. Again, Petitioners offer no reason or authority suggesting that an arbitrator will not faithfully and competently apply the doctrine of collateral estoppel.

In their final argument, Petitioners suggest that collateral estoppel was not "within the parties' contemplation at the time of their contractual undertaking to arbitrate," (Pet. Writ Cert. at 24), so that collateral estoppel is so "arcane" as to require resolution by a court under the holding of *First Options, Inc. v. Kaplan*, 115 S. Ct. 1920 (1995). The Wellington Agreement resolved only coverage disputes arising from alleged third-party asbestos-related *bodily injuries*; its scope did not encompass coverage disputes arising (under the same insurance policies) from alleged third-party asbestos-related *property damage*. As the Wellington Agreement resolved only the former class of claims, litigation over (and therefore judicial resolution of coverage issues in) the latter class of claims was entirely foreseeable. If the signatories to the Wellington Agreement desired that the collateral estoppel effect of such litigation on Wellington ADRs be decided

by a court, they should have excepted collateral estoppel from the Wellington Agreement's broad arbitration clause. *See First Options*, 115 S. Ct. at 1924 ("[G]iven the law's permissive policies in respect to arbitration, one can understand why the law would insist upon clarity before concluding that the parties did *not* want to arbitrate a related matter."); *see also National Union Fire Ins. Co. v. Belco Petroleum Corp.*, 88 F.3d 129, 135 (2d Cir. 1996) (rejecting argument that *First Options* requires collateral estoppel to be decided by a court).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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